

FILED '07 JUN 15 12:56 USDC-ORE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL RAY REKOW,)	
)	
Petitioner,)	Civ. No. 06-82-TC
)	
vs.)	
)	
)	FINDINGS AND RECOMMENDATION
)	
GUY HALL,)	
)	
Respondent.)	

Coffin, Magistrate Judge:

Petitioner petitions for a writ of habeas corpus on the basis of ineffective assistance of counsel and denial of due process. For the reasons that follow, the petition (#2) should be denied.

BACKGROUND

Petitioner was arrested at a residence in Waldport, Oregon, after shooting his girlfriend in the face and admitting his actions to a 9-1-1 operator and police. He was charged by grand jury indictment with (1) attempted murder with a firearm and (2) assault in the first degree with a firearm. Resp. Ex. 102. He pleaded not guilty. After a four-day trial, the jury returned guilty verdicts on both counts. Resp. Ex. 101. Petitioner was sentenced to consecutive terms of 90 months for attempted murder and 120 months for first-degree assault. Resp. Ex. 101.

On direct appeal, petitioner challenged his sentence under

1 the federal equal protection clause. The Oregon Court of Appeals
2 affirmed without an opinion, and the Oregon Supreme Court denied
3 further review. Resp. Ex. 103, 105-107.

4 Before the post-conviction court, petitioner raised five
5 claims of trial court error and 14 specifications of ineffective
6 assistance by trial and appellate counsel. The Umatilla County
7 Court denied relief. Petitioner appealed the post-conviction
8 court's ruling on one claim of ineffectiveness of trial counsel.
9 The Oregon Court of Appeals granted the state's motion for
10 summary affirmance, and the Oregon Supreme Court denied review.
11 Resp. Ex. 108, 124-130.

12 In the petition for writ of habeas corpus before this court,
13 petitioner asserts the following claims:

14
15 I. Ineffective Assistance of Trial Counsel, based on
16 alleged:

- 17 A. failure to adequately argue that the prosecution
18 did not demonstrate that a handgun qualifies as a
19 deadly weapon under the relevant statute;
- 20 B. failure to adequately argue against the imposition
21 of consecutive sentences;
- 22 C. failure to adequately challenge the court's
23 consideration of the victim's request for a severe
24 sentence;
- 25 D. failure to challenge the sentencing on the basis
26 of judicial bias;
- 27 E. failure to challenge the use of videotaped
28 testimony of the victim;
- 29 F. failure to object to evidence concerning the
30 "prejudicial results of the crimes and their
31 effects";
- 32 G. failure to reference, in closing argument, trial
33 testimony characterizing the shooting as an
34 accident;

35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

2 Findings and Recommendation

- H. failure to object to the prosecution's assertion that the weapon was found with a round in the chamber despite testimony that the weapon was empty; and,
- i. failure to object to evidence concerning the severity of the victim's injuries.

II. Ineffectiveness of Appellate Counsel, based on alleged:

- A. failure to argue that the prosecution did not demonstrate that the handgun qualified as a deadly weapon under relevant statute;
- B. failure to argue that consecutive sentencing was not authorized because defendant demonstrated criminal intent for only one crime;
- C. failure to argue that the statement of an officer at the scene describing his impression that the victim would not survive was unduly prejudicial;
- D. failure to argue that testimony concerning the severity of the victim's condition, admitted after defendant stipulated to her injuries, was unduly prejudicial;
- E. failure to argue that denial of an extreme emotional disturbance defense was unconstitutional;
- F. failure to argue that the sentencing decision was a product of judicial bias;
- G. failure to argue the ineffectiveness of petitioner's trial attorney;
- H. failure to argue that videotaped testimony of victim should not be admitted because victim was available to testify;
- I. failure to argue defense counsel's ineffectiveness in not emphasizing the testimony of a witness who characterized the incident as an accident;
- J. failure to object to the prosecutor's representation that the weapon was recovered loaded with a round;
- K. failure to argue the ineffectiveness of petitioner's trial counsel in not objecting to victim's testimony seeking imposition of the maximum possible sentence; and,

3 Findings and Recommendation

1 L. failure to argue the ineffectiveness of
2 petitioner's trial attorney in improperly
3 challenging the imposition of consecutive
4 sentences.

5 III. Denial of due process, based on the alleged inadequacy of
6 the post-conviction trial attorney.

7 Respondent contends that, because petitioner's claims are
8 unexhausted and defaulted, this court may not reach the merits of
9 the petition and dismissal is warranted. For the reasons that
10 follow, respondent is correct.

11 12 STANDARDS

13 A. Exhaustion

14 28 U.S.C. § 2254(b)(1) requires a petitioner to "exhaust[]
15 the remedies available in the courts of the State" prior to
16 seeking federal habeas corpus relief. The exhaustion
17 requirement, rooted in the "adequate and independent" state
18 grounds doctrine, ensures against intervention by the federal
19 habeas court unless that state courts have had the opportunity to
20 act on the petitioner's claims and correct them. Duncan v.
21 Henry, 513 US 364, 365, 115 S. Ct, 887, 130 L. Ed. 2d 865 (1995).
22 A claim is fairly presented in a state court when the legal basis
23 of the federal constitutional claim properly before the court;
24 explaining only the facts on which the claim is based claim is
25 insufficient. Picard v. Connor, 404 U.S. 270, 275-76, 92 S.Ct.
26 509, 512, 30 L.Ed.2d 438 (1971). A claim is not fairly presented
27 when it is raised in a "procedural context in which its merits
28

1 will not be considered." Castille v. Peoples, 489 U.S. 346, 351,
2 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989).

3
4 B. Procedural Default

5 In addition to properly seeking available remedies, a
6 petitioner is required to ensure that the relevant tribunals had
7 the opportunity to address the claim that is later articulated in
8 the habeas petition. Coleman v. Thompson, 501 U.S. 722, 730-32,
9 n.1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Otherwise, "habeas
10 would offer state prisoners whose custody was supported by
11 independent and adequate state grounds an end run around the
12 limits of this Court's jurisdiction and a means to undermine the
13 State's interest in enforcing its laws." Id. at 731. When "the
14 court to which petitioner would be required to present his claims
15 in order to meet the exhaustion requirement [finds] the claims
16 procedurally barred," the petitioner's default ordinarily bars
17 the habeas claim. Id. at 735, n.1.

18 The federal court will not review the defaulted claim unless
19 the petitioner shows "cause and prejudice" for the failure to
20 present the constitutional issues to the highest state court or
21 demonstrates that failure to consider the claims will result in
22 "a fundamental miscarriage of justice." Wainwright v. Sykes, 433
23 U.S. 72, 91, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Murray v.
24 Carrier, 477 U.S. 478, 488, 106 S. Ct. 639, 91 L.Ed.2d 397
25 (1986).

26 ANALYSIS

27 I. Ineffective Assistance of Trial Counsel Claims

28 Petitioner has failed to exhaust state remedies for relief

5 Findings and Recommendation

1 from ineffective assistance of trial counsel on Grounds I(A)-(E)
2 and I(G)-(i). Ground I(i) was not raised in petitioner's state
3 petition for post-conviction relief, nor in the post-conviction
4 appeals. Resp. Ex. 108, 124. The claim was not fairly presented
5 to any state court; because it is unexhausted and defaulted, this
6 court will not consider it. See Carriger v. Lewis, 971 F.2d
7 329, 333-34 (9th Cir. 1992) (new bases for ineffective
8 assistance not included in state petition are unexhausted); ORS
9 138.550(3) (any grounds not asserted in the original or amended
10 petition are deemed waived).

11 Grounds I(A)-(E) and I(G)-(H) were not raised in
12 petitioner's state post-conviction appeal to the Oregon Court of
13 Appeals. Resp. Ex. 124. That court affirmed the post-conviction
14 court without issuing a memorandum opinion. Under Oregon Rule of
15 Appellate Procedure 5.45, petitioner was required to set forth,
16 as assignments of error, assertions that the post-conviction
17 court erred in declining to afford relief on those grounds.
18 Failure to do so precludes review unless the Court of Appeals
19 determines that the errors are plain on the face of the record.
20 Or. R. App. Proc. 5.45. As a prerequisite to considering the
21 merits of those claims, the Court of Appeals must articulate why
22 it deems the error plain and why it is exercising its discretion
23 to review the unpreserved error. Ailes v. Portland Meadows,
24 Inc., 312 Or 376, 382 (1991). Because the Oregon Court affirmed
25 the post-conviction court without characterizing any of the
26 asserted errors as plain, it did not reach the merits of those
27 grounds. Those claims are unexhausted and defaulted; thus,
28 adequate and independent state grounds justify petitioner's

1 incarceration.

2 Ground I(F) was presented as an allegation of ineffective
3 assistance in petitioners amended post-conviction petition.
4 Resp. Ex. 108. That ground states that petitioner's trial
5 counsel was ineffective for "not adequately objecting to and
6 preventing the court's allowance of the prejudicial results of
7 the crimes and their effects, when these points have no biased
8 [sic] as to a determination of guilt." The assignment of error
9 to the Oregon Court of Appeals, however, alleged that
10 petitioner's trial counsel was ineffective for failing to argue
11 that when presented with an offer to stipulate to an element on
12 which prejudicial evidence would have been admitted, the court
13 must require the adverse party "to accept the stipulation so as
14 to forestall admission of prejudicial evidence." Resp. Ex. 124,
15 pp. i, 2.

16 In its brief to the Oregon Court of Appeals, the state
17 asserted that the court should summarily affirm on the basis that
18 petitioner's error was unpreserved and therefore did not present
19 a substantial question of law. Resp. Ex. 125; and see ORS
20 138.660 (permitting summary affirmance if "no substantial
21 question of law is presented by the appeal"). The post-
22 conviction trial record reveals that the particular error raised
23 on appeal was not brought to the attention of the post-conviction
24 trial court. Moreover, that court was apprised that petitioner's
25 defense counsel did, in fact, attempt to persuade the court to
26 exclude prejudicial evidence, and admission was attributable not
27 to trial counsel but to judicial error that should have been
28 raised on direct appeal. Resp. Ex. 121, Tr. 17-18.

7 Findings and Recommendation

1 The record does not indicate that the Oregon Court of
2 Appeals considered the merits of petitioner's assertion of
3 ineffective assistance described in Ground I(F); rather, the
4 record comports with the state's argument that the ground was
5 unpreserved in the post-conviction trial record and that
6 petitioner's failure to preserve precluded consideration of the
7 merits on appeal. In other words, petitioner presented his claim
8 in a "procedural context in which its merits would not be
9 considered." Coleman v. Thompson, 501 U.S. at 750. For these
10 reasons, this court determines that Ground I(F) is defaulted and
11 inappropriate for consideration on habeas review.

12 13 II. Ineffective Assistance of Appellate Counsel Claims

14 Grounds II(G)-(L) were not raised in petitioner's state
15 petition for post-conviction relief or in the post-conviction
16 appeals. Resp. Ex. 108, 124. The claims were not fairly
17 presented to any state court; because they are unexhausted and
18 defaulted, this court will not consider them.

19 Grounds II(A)-(H), though raised in petitioner's state
20 petition for post-conviction relief, were not advanced on post-
21 conviction appeal. Resp. Ex. 108, 124. Petitioner's failure to
22 do so renders those claims unexhausted and precludes review of
23 the merits in this court.

24 Petitioner asserts the court should nonetheless review
25 Ground II(B). In petitioner's view, his appellate counsel failed
26 to adequately argue that the imposition of consecutive sentences
27 violated due process because "[t]o assign the injuries" stemming
28 from a single gunshot wound "to a specific count" of either

1 attempted murder or aggravated assault for purposes of imposing
2 consecutive sentences under the relevant statute "is arbitrary
3 and capricious and necessarily implies an intent to commit each
4 crime." Petitioner's Memorandum, p. 5. Petitioner contends that
5 he instructed his appellate attorney to pursue the argument, but
6 the attorney failed to do so.

7 By declining to raise the matter in his post-conviction
8 appeal, petitioner has failed to exhaust the claim. Petitioner
9 asserts in argument to this court that he instructed his post-
10 conviction appellate attorney to the point and that the attorney
11 declined to do so. Petitioner does not, however, argue that any
12 exceptions to the exhaustion doctrine enable this court to reach
13 the merits of his claim. Even if petitioner had successfully
14 exhausted his claim, there is no indication that his appellate
15 attorney acted unreasonably in declining to advance petitioner's
16 sentencing argument, where no precedent precluded imposition of
17 consecutive sentences on petitioner's asserted reasoning.¹

18
19 ¹ Petitioner suggests that a case decided after his
20 sentencing, State v. Warren, 168 Or. App. 1, 5 P.3d 1115,
21 review denied, 330 Or. 412, 8 P.3d 220 (2000), construed the
22 relevant statute, ORS 137.123(5)(a), to disallow consecutive
23 sentences under similar facts, and its reasoning supports
24 petitioner's contention that his appellate counsel provided
25 ineffective assistance. Petitioner's assertion is problematic,
26 inasmuch as Warren held that consecutive sentences may be
27 imposed for attempted murder and first-degree assault where a
28 "defendant intended to kill the victim and that he acted
volitionally to cause the victim serious physical injury" where
the sentencing court so finds. 168 Or. App. at 6. Regardless
of whether petitioner's assertions concerning his instructions
to his appellate counsel are accurate, whether his counsel
provided constitutionally adequate representation rests on the
reasonableness of his or her decision based on prevailing
standards at the time of the representation. See Strickland v.

1 In sum, petitioner's ineffective assistance of appellate
2 counsel claims are unexhausted and defaulted and should be
3 dismissed.

4
5 III. Due Process Claim

6 Petitioner asserts that he is being held in violation of the
7 United States Constitution because his post-conviction counsel
8 was inadequate for failing to advance his arguments against
9 consecutive sentencing. Petitioner also contends that, despite
10 petitioner's requests, his appellate post-conviction attorney
11 chose not to assert the unpreserved claim in petitioner's appeal.

12 As the state correctly argues, petitioner's claim fails
13 because petitioner has not demonstrated a constitutional error,
14 inasmuch as there is no constitutional right to an attorney in
15 post-conviction proceedings. Bonin v. Vasquez, 999 F.2d 425, 429
16 (9th Cir. 1993). Moreover, petitioner did not argue that his
17 post-conviction trial counsel was inadequate before the post-
18 conviction court or on appeal. Though such an argument seems
19 hardly viable in light of the lack of any constitutional error,
20 petitioner was required to exhaust avenues for relief that were


21
22 Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674
23 (1984). Declining to put forth petitioner's argument where
24 facts would have supported a finding that defendant intended to
25 kill his girlfriend and to cause her serious harm would not
26 have constituted deficient representation. See Wildman v.
27 Johnson, 261 F.3d 832, 842 (9th Cir. 2001) (in habeas action,
28 holding that appellate counsel did not provide ineffective
assistance in deciding not to challenge consecutive sentences
under ORS 137.123 where facts supported a finding that the
petitioner intended to kill and inflict serious bodily harm to
his victim; petitioner's sentencing pre-dated Warren).

1 available to him prior to bringing this action, and he failed to
2 do so. He does not argue that any exception to the exhaustion
3 doctrine should apply. The claim warrants dismissal.

4
5 CONCLUSION

6 Petitioner's petition for writ of habeas corpus (#2) should
7 be denied, and this case should be dismissed. This
8 recommendation is not an order that is immediately appealable to
9 the Ninth Circuit Court of Appeals. Any notice of appeal
10 pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure,
11 should not be filed until entry of the district court's judgment
12 or appealable order. The parties shall have ten days from the
13 date of service of a copy of this recommendation within which to
14 file specific written objections. Failure to timely file
15 objections to any factual determinations of the Magistrate Judge
16 will be considered a waiver of a party's right to de novo
17 consideration of the factual issue and will constitute a waiver
18 of a party's right to appellate review of the findings of fact in
19 an order or judgment entered pursuant to the Magistrate Judge's
20 recommendation.

21
22 Dated this 15 day of June, 2007.

23
24
25 
26 _____
27 THOMAS M. COFFIN
28 United States Magistrate Judge